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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-1520

PHILLIP BURROUGHS, *et al.*,

Petitioners,

vs.

STERLING TRANSIT COMPANY, a California corporation, *et al.*,

Respondents.

On Certiorari to the United States Court of Appeals for the Ninth Circuit.

Union-Respondents' Brief in Opposition to Petition for Certiorari.

Statement of the Case.

This brief is being submitted on behalf of the Union-Respondents, which are Joint Council of Teamsters No. 42; Local Freight Drivers Union, Local No. 208; Freight Handlers, Clerks & Helpers, Local Union No. 357; and Package & General Utility Drivers, Local Union No. 396.

In addition to the facts stated in the Petition for Writ of Certiorari, the record shows that more than 30 days prior to the filing of the motion to permit a late notice of appeal, at least some of the petitioners were aware that an appeal had not been filed for them by

their prior attorney. (The motion was lodged in the district court on June 14, 1972 [CR 28]; one of the petitioners' affidavits in support of the motion is dated April 28, 1972, or 45 days prior to the lodging of the motion [CR 43][1]; and another of the petitioners whose affidavit is dated May 5, 1972, states that "to this date [*i.e.*, May 5, or 38 days prior to the lodging of the motion], we have found no evidence that an appeal was made" [CR 35/22-23].)

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[1]While it is true, as stated in the petition, that some of the petitioners are of Spanish surname, this petitioner is not. Moreover, there is nothing in the record to indicate, as stated in the petition at 9, that "petitioners are . . . mostly of Mexican birth or descent, unlearned in the law and the English language. . . ."

ARGUMENT.

None of the grounds contained in Supreme Court Rule 19 for seeking certiorari are presented by the petitioners. Nor do any exist. Further, even if this Court were to consider this matter a proper one for review, on the merits both the district court and the court of appeals rendered the correct decisions.

A. The Trial Court Had No Discretion Because the Timely Filing of a Notice of Appeal Is Jurisdictional.

The petitioners make no mention in their brief of the numerous cases which hold FRAP No. 4(a) to be jurisdictional, not permissive. *See, e.g., Alexander v. Sacha,* 439 F.2d 742 (9th Cir. 1971); *Lathrop v. Oklahoma City Housing Auth.,* 438 F.2d 914 (10th Cir. 1971), *cert. denied,* 404 U.S. 840 (1971). There is no conflict in the circuits on this score. *Weedon v. Gaden,* 419 F.2d 303, 307-08 (D.C. Cir. 1969).

The argument by the petitioners is made, rather, that FRAP No. 4(a) should be analogized to United States Supreme Court Rule No. 22. The analogy is faulty for these reasons.

First, FRAP No. 26(b) states that "the court may not enlarge the time for filing a notice of appeal." No similar injunction is contained in the Supreme Court Rules. *Compare* Supreme Court Rule No. 34 *with* FRAP No. 26(b).

Second, the Advisory Committee's Notes to FRAP No. 3 read as follows:

> "Rules 3 and 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an ap-

peal. Because the timely filing of a notice of appeal is 'mandatory and jurisdictional,' United States v. Robinson, 361 U.S. 220, 224, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), compliance with the provisions of those rules is of the utmost importance."

In light of the jurisdictional status of FRAP No. 4 (a), there is no basis upon which to examine the petitioners' other points. But even if the Court should, these points too lack merit.

B. Assuming Discretion in the District Court to Grant the Petitioners' Motion, It Was Properly Denied.

No authorities are presented for the proposition that the reasons set forth by the petitioners for not sooner filing a notice of appeal constitute "excusable neglect."

Moreover, the petitioners' own affidavits show that at least as early as April 28, 1972, 45 days prior to the time the motion was finally lodged with the district court, some of them contacted their present counsel and signed the affidavit in support of their motion.[2] Yet no attempt to file a motion was made until June 1, 1972 [CR 57/27-28], and it was not until June 14 that it was successfully lodged.

The court below held there to be no excusable neglect [CR 84/7-11]. In light of the long period that elapsed between the time petitioners first contacted their present counsel and the time the motion was eventually lodged, the court was fully justified in relying upon the petitioners' failure to more timely file their motion as evidence that the past neglect was not excusable. *See Weedon v. Gaden,* 419 F.2d 303, 307-08

[2]See note 1, *supra.*

(D.C. Cir. 1969) (lack of notice to petitioners or their counsel that order had been entered, not excusable neglect for not filing timely appeal).

C. There Is No Lack of Due Process Because the Petitioners Have a Remedy.

Unlike the situation of a defendant in a criminal case whose ineffective counsel lands the defendant in jail, the petitioners may have the right to file a malpractice action against their former attorney and recoup any loss they may have suffered. Hence, the analogy to criminal law is inapposite. The issue of whether the attorney may be judgment-proof (no evidence of this appears in the record) is not relevant to the rule of law involved.

Conclusion.

For these reasons, the petition should be denied.

Respectfully submitted,

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